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THE CITY OF ARTESIA, CALIFORNIA

18747 CLARKDALE AVENUE, ARTESIA, CALIFORNIA 90701

Telephone 562 / 865-6262

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November 25, 2008

Joe Parilo
Acting Regulations Coordinator
P.O. Box 942702
Sacramento, California 94229-2702

Re: Notice of Proposed Regulatory Action for PERS

Below are our comments regarding the Proposal to add Article 6.5 entitled "Membership" (Sections 578 and 578.1) in Title 2 of the California Code of Regulations:

As a public agency and member of the California Public Employees' Retirement System, we agree to add Article 6.5 on MEMBERSHIP. We understand that the purpose of this article is crucial to the proper determination of employee status and therefore, the eligibility for CalPERS membership for retirement benefits purposes.

Government Code Section 20028(b) generally defines "employee" as "any person in the employ of" the state, a school employer, or a contracting agency. With the addition of this article on membership, the criteria for determination of employee status becomes more specific.

Furthermore, Section 578.1 is generally consistent with IRS' common law employment factors (test) which distinguishes between employee and independent contractor. Three main categories are covered: behavioral control, financial control and the type of relationship of the parties. However, there is no clear reference to IRS rules (Publication 15-A 1/2007) on Employer's Supplemental Tax Guide. For example, there is also no specific reference to Training but this may relate to Section 578.1, (c), (3).

On the overall, this article serves the purpose of making specific the criteria used to determine whether an individual is the employee of a CalPERS-covered employer.

Thank you for the opportunity to offer comments. Should you have any questions, please do not hesitate to contact me at (562) 865-6262.

Sincerely,

Marivic "Avic" Nazario
Management Analyst
City of Artesia
18747 Clarkdale Ave.
Artesia CA 90701



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Sacramento, CA 94229-2709
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December 9, 2008

Ms. Marivic "Avic" Nazario
Management Analyst
City of Artesia
18747 Clarkdale Ave.
Artesia, CA 90701

Dear Ms. Nazario:

Thank you for taking the time to submit comments relating to the proposed regulatory action by CalPERS regarding determination of employee status. This letter is in response to the comments you submitted to CalPERS in your letter dated November 25, 2008. Each of your comments, as we understand them, will be restated below, followed by CalPERS staff's responses.

Comment 1. "As a public agency and member of the California Public Employees' Retirement System we agree to add Article 6.5 on Membership. We understand that the purpose of this article is crucial to the proper determination of employee status and therefore, the eligibility for CalPERS membership for retirement benefits."

Response to Comment 1. CalPERS staff agrees with your comment.

Comment 2: Government Code section 20028(b) generally defines "employee" and with the addition of this article on membership, the criteria for determination of employee status becomes more specific.

Response to Comment 2. CalPERS staff agrees with your comment.

The proposed regulations require that the term employee be determined using the common law test for employment. The regulations seek to interpret, make specific and apply the Public Employees' Retirement Law (PERL), the case law and the Board's Precedential Decisions which set forth the applicable criteria of the common law test for employment.

Comment 3: Section 578.1 is generally consistent with IRS' common law employment factors (test) which distinguishes between employee and independent contractor. You also commented that the regulations provide no clear reference to the IRS rules.

Response to Comment 3: CalPERS has generally applied common law principles when making employee determinations. As noted above, the proposed regulations seek to make specific, interpret and apply the PERL, case law and our Board's Precedential Decisions.

The California Supreme Court held in *Metropolitan Water District v. Superior Court* when determining whether individuals are employees of a public agency, CalPERS must apply the common law test for employment.¹ In *Cargill*, the California Supreme Court referred to the factors discussed in *Tieberg v. Unemployment Ins. App. Bd.*² The regulations also interpret the Board's Precedential Decisions in the *Neidengard* and *Galt Services Authority* cases which refer to these same factors to determine employee status.³

You correctly note that the proposed regulations do not refer to the IRS rules for determining who is a common law employee. As noted above, CalPERS is bound to apply the common law test for employment based on the cases discussed above.

Comment 4: On the overall, this article serves the purpose of making specific the criteria to determine whether an individual is the employee of a CalPERS-covered employer.

Response to Comment 4: CalPERS agrees with your comment.

Again, we thank you for your comments. Please note that a public hearing on the proposed regulatory actions by CalPERS which was originally scheduled for December 17, 2008, will be held on December 16, 2008, during the Benefits and Program Administration Committee Meeting scheduled to begin at 8:30 a.m., in the Lincoln Plaza North Auditorium at 400 Q Street in Sacramento.

Sincerely,


Lori McGartland, Chief
Employer Services Division

¹ *Metropolitan Water District v. Superior Court* (2004) 32 Cal.4th 491, 509 (also referred to as "*Cargill*").

² *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d. 943

³ See *In the Matter of the Application for CalPERS Membership Credit by Lee Neidengard v. Tri-Counties Association for the Developmentally Disabled*, Precedential Case No. 05-01, (2005) and *In the Matter of the Application to Contract with CalPERS by Galt Services Authority*, Precedential Decision No. 08-01, (2008).

Maliguine, SalliAnne

Subject: FW: Public Comment-Determination of Employee Status

Attachments: Title 2 Membership Public Comments.doc

From: Lorna Owens [mailto:lornao@tri-counties.org]

Sent: Wednesday, November 26, 2008 5:30 PM

To: Parilo, Joe

Subject: Public Comment-Determination of Employee Status

Dear Joe-

I am submitting recommended revisions to the Proposed Regulatory Action, Article 6.5 Membership, regarding Determination of "Employee" Status. Please see the attached document which shows these revisions in red font per the Word document "track changes" feature.

Should you have any questions, please contact me.

Thank you for the opportunity to provide public comments.

Sincerely,

Lorna Owens
Chief Financial Officer
Tri-Counties Regional Center
520 E. Montecito St.
Santa Barbara, CA 93103
(805) 884-7292 phone
(805) 884-7277 fax

12/8/2008

Title 2. California Public Employees' Retirement System

NOTICE OF PROPOSED REGULATORY ACTION

Add Article 6.5. MEMBERSHIP

Sections 578 and 578.1 to

Title 2 of the California Code of Regulations

ARTICLE 6.5. MEMBERSHIP

§ 578. Scope and Authority.

These regulations interpret the California Public Employees' Retirement Law, Government Code sections 20000 - 21765, by making specific the criteria for employee determinations.

§ 578.1. Determination of "Employee" Status.

(a) For the purposes of the California Public Employees' Retirement Law, and for retirement programs administered by the Board of Administration, CalPERS shall utilize the California common law employment test as set forth in subdivisions (b) and (c), below, to determine whether an individual is "in the employ of" an entity as that phrase is used in Government Code section 20028.

(b) The most important factor in determining employee status is the right of the entity seeking to have the services performed to control the manner and means of accomplishing the result desired, regardless of whether that right is exercised with respect to all details .

(c) The other factors to be taken into consideration are:

(1) Whether or not the individual performing the services is engaged in a distinct occupation or business.

(2) Whether or not the individual performing the services can work for others and can make a profit or loss.

(3) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the entity seeking to have the services performed without supervision.

(4) Whether or not the kind of occupation is often part of industry practice.

(5) The skill required in the particular occupation.

(6) The type of training necessary in the particular occupation and the source of such training.

(7) Whether the entity seeking to have the services performed, or the individual performing the services, supplies the instrumentalities, tools and the place of work for individual performing the services.

(8) The length of time for which the services are performed under contract and if the contract specifies an end date or a continuing relationship.

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(9) Whether or not there are set work hours.

(10) The method of payment, whether by the time or by the job.

Deleted: 6

(11) Whether or not the individual performing services receives any benefits that are provided to the employees of the business entity.

(12) Whether or not the work is part of the regular business of the entity seeking to have the services performed.

Deleted: 7

(13) Whether or not the parties believe they are creating the relationship of employer and employee and there exists signed contracts by both parties evidencing such.

Deleted: 8

(d) If the California Public Employees' Retirement System determines, based on the factors listed in subdivisions (b) and (c), above, that the individual does not have employee status, then the individual is not eligible for membership in the California Public Employees' Retirement System for those services.

NOTE: Authority cited: Sections 20120, 20121 and 20125, Government Code.

Reference: Sections 20028; 20030, 20069; 20125; 20281; 20283; 20284; 20300, subdivision (b); 20370; 20460; 20502; Government Code; *Metropolitan Water District of Southern California v. The Superior Court of Los Angeles County (Cargill)* (2004) 32 Cal.4th 491; *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943; and *In the Matter of the Application for CalPERS Membership Credit by Lee Niedengard and Tri-Counties Association for the Developmentally Disabled* (CalPERS Precedential Decision No. 05-01, effective April 22, 2005.)



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December 9, 2008

Ms. Lorna Owens
Chief Financial Officer
Tri-Counties Regional Center
520 E. Montecito Street
Santa Barbara, CA 93103

Dear Ms. Owens:

Thank you for taking the time to submit comments relating to the proposed regulatory action by CalPERS regarding determination of employee status. This letter is in response to the comments you submitted to CalPERS in your correspondence dated November 26, 2008. Your comments, as we understand them, are discussed below, followed by CalPERS staff's response.

Comment 1. You submitted proposed changes to the actual language of section 578.1, one of the proposed regulations. You suggested several additional criteria be added to the proposed regulation including:

- "Whether or not the individual performing services can work for others and can make a profit or loss."
- "Whether or not the kind of occupation is often part of industry practice."
- "The type of training necessary in the particular occupation and the source of such training."
- "The length of time for which the services are performed *under contract and if the contract specifies an end date or a continuing relationship.*" (You requested the portion in italic be added to section 578.1, subdivision (c)(5).)
- "Whether or not there are set work hours."
- "Whether or not the individual performing services receives any benefits that are provided to the employees of the business entity."
- "Whether or not the parties believe they are creating the relationship of employer and employee *and there exists signed contracts by both parties evidencing such.*" (You requested the portion in italic be added to section 578.1, subdivision (c)(8).

Response to Comment 1: CalPERS staff disagrees with your suggested additions to the proposed regulations. The proposed regulations incorporate the common law test for employment as articulated by the California Supreme Court and as referred to by the CalPERS Board of Administration (Board) in two Precedential Decisions. The proposed regulations seek to clarify, interpret and apply the Public Employees' Retirement Law (PERL), applicable case law and the Board's Precedential Decisions setting forth the common law test for employment criteria applicable for CalPERS employee determinations.

The California Supreme Court held in *Metropolitan Water District v. Superior Court* when determining whether individuals are employees of a public agency, CalPERS must apply the common law test for employment.¹ In *Cargill*, the California Supreme Court referred to the factors discussed in *Tieberg v. Unemployment Ins. App. Bd.*² The regulations also interpret the Board's Precedential Decisions in the *Neidengard* and *Galt Services Authority* cases which refer to these same factors to determine employee status.³ Since the proposed regulations include the applicable common law test for employment criteria from the cases discussed above, CalPERS staff is not able to recommend the additions you suggest to the CalPERS Board.

We again thank you for your comments and hope this letter helps you gain a better understanding of the proposed regulations.

Please note that a public hearing on the proposed regulatory actions by CalPERS which was originally scheduled for December 17, 2008, will be held on December 16, 2008, during the Benefits and Program Administration Committee Meeting scheduled to begin at 8:30 a.m., in the Lincoln Plaza North Auditorium at 400 Q Street in Sacramento.

Sincerely,



Lori McGartland, Chief
Employer Services Division

¹ *Metropolitan Water District v. Superior Court* (2004) 32 Cal.4th 491, 509 (also referred to as "*Cargill*").

² *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d. 943

³ See *In the Matter of the Application for CalPERS Membership Credit by Lee Neidengard v. Tri-Counties Association for the Developmentally Disabled*, Precedential Case No. 05-01, (2005) and *In the Matter of the Application to Contract with CalPERS by Galt Services Authority*, Precedential Decision No. 08-01, (2008).